

1 file with the Public Utilities Commission: (1) Rule 14 of L.A. Cellular's General Rules  
2 Applicable to Cellular Radio Telecommunications Service; (2) L.A. Cellular's Advice Letter  
3 No. 15, which became effective on December 6, 1988; (3) and L.A. Cellular's Advice Letter  
4 No. 555, which became effective on January 24, 1995. Copies of the aforementioned  
5 materials are attached to the Declaration of Robert Wright filed concurrently herewith.

6 This Motion is based on this Notice, the attached Memorandum of Points and  
7 Authorities, the Separate Statement of Undisputed Facts submitted concurrently herewith, the  
8 Declaration of Stephen Fowler submitted concurrently herewith, the Declaration of Robert H.  
9 Wright submitted concurrently herewith, the Statement of Non-California and Regulatory  
10 Authority submitted concurrently herewith, the complete pleadings and records on file in this  
11 action, and such other evidence and argument as may be presented to the Court at or prior to  
12 the hearing of the Motion.

13  
14 DATED: June 25, 1997

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **SUMMARY OF ARGUMENT**

4 Plaintiff challenges the practices of defendant Los Angeles Cellular Telephone  
5 Company ("L.A. Cellular") in handling so-called "dropped calls" -- calls which are  
6 interrupted involuntarily. Plaintiff alleges that L.A. Cellular fraudulently conceals its  
7 dropped-call policy.

8 In making these allegations, plaintiff ignores the fact that L.A. Cellular has duly filed  
9 with the Public Utilities Commission ("PUC") tariffs that fully disclose its treatment of  
10 dropped calls and limit its liability for dropped calls. These tariffs have the force and effect  
11 of law and are deemed a part of all L.A. Cellular customer contracts. The tariffs render  
12 plaintiff's fraudulent concealment claims untenable.

13 Plaintiff is also precluded from challenging in this Court the terms of L.A. Cellular's  
14 tariffs on the grounds that they are allegedly unfair or misleading. Only the California  
15 Supreme Court or Court of Appeal has jurisdiction to review orders and decisions of the  
16 PUC, and courts have routinely rejected challenges to filed tariffs when brought in the  
17 superior court.

18 **II.**

19 **BACKGROUND**

20 The phrase "dropped call" refers to a cellular telephone call that is involuntarily  
21 interrupted due to causes beyond the control of a cellular telephone subscriber. Dropped calls  
22 may occur for a number of reasons including unusual atmospheric conditions and difficulty in  
23 providing cellular telephone service within certain hard to reach areas such as tunnels.  
24 Dropped calls are an expected and natural result of the use of radio-based technology in  
25 telecommunications. The phrase "dropped call" does not include those calls interrupted by  
26 causes within the control of a cellular subscriber, such as a subscriber accidentally  
27 unplugging a phone or allowing a battery to run down. (Declaration of Stephen Fowler  
28 ("Fowler Decl.") at ¶ 2.)

1    **A. The PUC Has Extensive Jurisdiction Over Public Utilities in California.**

2           L.A. Cellular has filed with the PUC a tariff fully disclosing its treatment of dropped  
3   call credits. This tariff is deemed part of L.A. Cellular's customer contracts because of the  
4   PUC's authority over public utilities. First, the California Constitution subjects public  
5   utilities to "control by the Legislature." Cal. Const. Art. XII, § 3. To effect this control, the  
6   Constitution created the PUC and grants it far-reaching powers. Cal. Const. Art. XII, §§ 1-6.  
7   Second, the Legislature has detailed the scope of these powers in a complex regulatory  
8   scheme giving the PUC broad authority to investigate the practices, facilities, and services of  
9   public utilities. Cal. Pub. Util. Code §§ 584, 703. The Legislature has further delegated to  
10   the PUC the power to bind public utilities by its orders, decisions, and directives. Cal. Pub.  
11   Util. Code § 702.

12           The linchpin of the PUC's supervisory and regulatory power is its tariff filing  
13   requirements. The PUC has required public utilities to file tariffs, for PUC and public  
14   review, that detail their "rules, contracts, privileges, and facilities" relating to service. Cal.  
15   Pub. Util. Code § 489. The PUC may alter these tariffs and establish new rules or practices  
16   for the utilities. Cal. Pub. Util. Code §§ 729, 761. And under the established law in  
17   California, these tariffs have the force and effect of law. See Dyke Water Co. v. Public  
18   Utilities Commission, 56 Cal. 2d 105, 123 (1961) (stating that a tariff "when so published and  
19   filed, had the force and effect of a statute").

20           Because L.A. Cellular is a public utility providing cellular service in the Los Angeles  
21   area, L.A. Cellular was subject to the full regulatory authority of the PUC until 1995. See  
22   Cal. Pub. Util. Code §§ 216(a), 234. In 1993, the United States Congress passed the  
23   Omnibus Budget Reconciliation Act (amending the Communications Act of 1934, 47 U.S.C.  
24   §§ 151 et seq.), which changed the regulatory scheme by expressly removing any state  
25   regulation of cellular service rates. 47 U.S.C. § 332(c)(3)(A). This law became effective in  
26   California on August 8, 1995 after the State of California unsuccessfully petitioned the  
27   Federal Communications Commission for the authority to retain rate regulatory authority in  
28

1 California. Petition of California to Retain Regulatory Authority Over Intrastate Service  
2 Rates, 1995 WL 468206 (F.C.C. Aug. 8, 1995) (Order on Reconsideration).

3 Although the Omnibus Budget Reconciliation Act of 1993 removed state jurisdiction  
4 over cellular service rates, the Act expressly provides that states may continue to regulate the  
5 "other terms and conditions" of cellular service. 47 U.S.C. § 332(c)(3). The PUC has held  
6 that, until it promulgates uniform consumer protection rules, it will continue to regulate "other  
7 terms and conditions" by enforcing existing non-rate tariff provisions.<sup>1</sup> Re Mobile Telephone  
8 Service and Wireless Communications, 174 P.U.R. 4th 543, 553 (Cal. PUC, Dec. 20, 1996);  
9 PUC General Order No 96-A (Cal. PUC, Mar. 1, 1996). L.A. Cellular's non-rate tariffs  
10 therefore continue to have the full force and effect of law and are binding on plaintiff in this  
11 case.

12 This Court has recognized the existence of federal preemption in this area in its Order  
13 denying L.A. Cellular's Motion for Judgment on the Pleadings. In that Order, the Court  
14 ruled: "If this action seeks to regulate rates, then the action is preempted by the Federal  
15 Communications Act." (Order Dated 1/14/97.) As the court held in In re Comcast Cellular  
16 Telecom. Litigation, 949 F. Supp. 1193 (E.D. Pa. 1996), claims based on failure to disclose a  
17 billing practice may be preempted. Id. at 1201. Here, however, this Court reasoned that  
18 (putting aside the issue of rates charged for dropped calls), the gravamen of the complaint was  
19 L.A. Cellular's alleged deceptive acts in "misleading its customers." (Order Dated 1/14/97.)

20 Although this Court found that plaintiff's complaint states claims outside the scope of  
21 federal preemption, plaintiff's efforts to avoid the bar of federal preemption have lead to a  
22 complaint that simply has no basis under state law. Plaintiff's claim that L.A. Cellular  
23

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24  
25 <sup>1</sup> In December of 1996 the PUC ruled that a cellular-service provider no longer need file  
26 new tariffs but must continue "to maintain a record of its rates, other terms and conditions  
27 and revisions thereto, at its general office." Re Mobile Telephone Service and Wireless  
28 Communications, 174 P.U.R. 4th 543, 552 (Cal. PUC, Dec. 20, 1996). L.A. Cellular's  
tariff addressing dropped-calls, however, dates prior to December 1996 and is on file with  
the PUC. (Declaration of Robert Wright ("Wright Decl.") at ¶¶ 4-5 and Exhs. B, C.)

1 conceals its policy is without merit because L.A. Cellular's tariff fully discloses its policy;  
2 the tariff has the force and effect of law, and it constitutes notice to all customers.

3 **B. L.A. Cellular's Tariff Discloses Its Policy for Dropped Calls and Limits its**  
4 **Liability.**

5 As required by law, L.A. Cellular has filed with the PUC its Retail Tariffs and Special  
6 Conditions Applicable to the Cellular Radio Telecommunications Service and its General  
7 Rules Applicable to Cellular Radio Telecommunications Service ("L.A. Cellular's tariffs").  
8 (Wright Decl. at ¶ 2.) (Undisputed Facts 1, 19, 27.) These tariffs include provisions limiting  
9 L.A. Cellular's liability.

10 Rule 14 of L.A. Cellular's tariffs discloses L.A. Cellular's liability to its customers for  
11 interruptions in service. (Wright Decl. at ¶ 3 and Exh. A.) The Rule is entitled "Limitation of  
12 Liability" and begins: "The Company's liability to its customers for interruptions in the  
13 service furnished by the Company is as follows: . . . ." (Undisputed Facts 2, 20, 28.) The  
14 Rule then details the limits of L.A. Cellular's liability including its liability for dropped calls.

15 Part 6 of the Rule states that "[i]n the case of dropped or garbled calls, and on receipt  
16 of appropriate proof, the Utility will extend credit to the customer for part or all of the usage  
17 charges applicable to the calls in question." (Undisputed Facts 3, 21, 29.) L.A. Cellular  
18 added this provision to its tariff by Advice Letter No. 15, which became effective on  
19 December 6, 1988. (Wright Decl. at ¶ 4 and Exh. B.) (Undisputed Facts 4, 22, 30.)

20 Part 8 of the Rule states that "[c]laims for credits by non-reseller customers on account  
21 of service interruptions or for missed, dropped or garbled calls shall be made within ninety  
22 days after the end of the relevant customer's billing cycle in which the interruption or other  
23 malfunction is alleged to have occurred." (Undisputed Facts 5, 23, 31.) L.A. Cellular added  
24 this provision to its tariff by Advice Letter No. 555, which became effective on  
25 January 24, 1995. (Wright Decl. at ¶ 5 and Exh. C.) (Undisputed Facts 6, 24, 32.)

26 L.A. Cellular fully complies with Rule 14 of its tariff by providing a credit to any of its  
27 customers who request credit for dropped calls. L.A. Cellular provides such a credit upon the  
28 request of a customer when a customer redials a call within five minutes after that call is



1 dropped and the customer has not placed any intermediate calls prior to redailing the dropped  
2 call. (Fowler Decl. at ¶ 3.) (Undisputed Facts 7, 33.) The amount of the credit is the air time  
3 cost to the customer of the first minute of the redialed call. (Fowler Decl. at ¶ 3.)  
4 (Undisputed Facts 8, 34.)

5 Because L.A. Cellular's customer service representatives do not have access to a  
6 customer's calling records for any given month until after the end of the billing cycle for that  
7 month, L.A. Cellular requires that a customer who is requesting credit for dropped calls do so  
8 after the end of that customer's billing cycle. (Fowler Decl. at ¶ 4.) (Undisputed Facts 9,  
9 35.) The customer has ninety days from the end of the billing cycle in which the interruption  
10 occurred to request credit for dropped calls. (Fowler Decl. at ¶ 4.) (Undisputed Facts 10,  
11 36.) This policy is fully disclosed in the tariff filed with the PUC. (Wright Decl. at ¶¶ 2-5,  
12 Exh. A, B, C.) (Undisputed Facts 1-6.)

13 To ensure compliance with the tariff, L.A. Cellular trains its customer service  
14 representatives regarding the proper handling of dropped-call credits and requires all of its  
15 representatives to familiarize themselves with L.A. Cellular's policy for handling credits for  
16 dropped-calls. (Fowler Decl. at ¶ 6.) (Undisputed Facts 11, 37, 38.) Thus L.A. Cellular's  
17 Core Service Skills training manual instructs representatives regarding "When a Customer  
18 Calls for Dropped Call (Billed Air) Credit." Among other things, the representative is asked  
19 to "Please Remember" that "One air time minute credit will be issued for each redial made  
20 after a call has been 'dropped,' 'cut-off' or disconnected mid-conversation." (Fowler Decl. at  
21 ¶ 6 and Exh. A.)

22 L.A. Cellular's customer service is available by telephone twenty-four hours a day,  
23 seven days a week. (Fowler Decl. at ¶ 5.) (Undisputed Facts 12, 39.) L.A. Cellular staffs its  
24 customer care department in anticipation of expected call volumes and at the present time  
25 employs approximately two hundred and fifty customer service representatives. (Fowler  
26 Decl. at ¶ 5.) (Undisputed Facts 13, 40.) L.A. Cellular's customer service representatives  
27 address the questions and concerns of L.A. Cellular's customers and, when appropriate,  
28 provide customers with credits including credits for dropped-calls. (Fowler Decl. at ¶ 5.)

1 L.A. Cellular has made no attempt to misrepresent the terms of its policy for providing  
2 dropped-call credits and none of its written materials misrepresent the terms of that policy.  
3 (Fowler Decl. at ¶ 7.) (Undisputed Facts 14, 26.) To the contrary, L.A. Cellular has trained  
4 its customer service representatives to inform customers of L.A. Cellular's policy for handling  
5 dropped-call credits whenever a customer requests such information. (Fowler Decl. at ¶ 7.)  
6 (Undisputed Facts 15, 41.) The fact that L.A. Cellular routinely receives requests for  
7 dropped-call credits and routinely extends such credits demonstrates the absurdity of  
8 plaintiff's argument that L.A. Cellular has concealed its policy of providing credits for  
9 dropped calls. (Fowler Decl. at ¶ 7.) (Undisputed Facts 16, 25, 42.) Finally, L.A. Cellular's  
10 cellular-service contracts refer generally to the existence of L.A. Cellular's tariffs on file with  
11 the PUC (and those tariffs disclose L.A. Cellular's policy for handling dropped-call credits).  
12 (Fowler Decl. at ¶ 7.) (Undisputed Facts 17, 18.)

### 13 III.

#### 14 LEGAL STANDARDS GOVERNING THIS MOTION

15 Summary judgment is proper where "there is no triable issue as to any material fact"  
16 and "the moving party is entitled to a judgment as a matter of law." Cal. Civ. Proc.  
17 Code § 437c(c). Summary adjudication is proper where "a cause of action has no merit" and  
18 granting the motion "completely disposes of a cause of action." Cal. Civ. Proc.  
19 Code § 437(f). A party cannot prevent the entry of summary adjudication by inartful  
20 pleading; where "separate and distinct wrongful acts are combined under the same cause of  
21 action," summary adjudication is proper to dispose of a cause of action based on one or more  
22 of those acts. Lilienthal & Fowler v. Superior Ct., 12 Cal. App. 4th 1848, 1854 (1993).

23 In this case, L.A. Cellular has produced evidence proving a complete defense. The  
24 burden therefore shifts to plaintiff to show "that a triable issue of one or more material facts  
25 exists as to that cause of action or a defense thereto." Cal. Civ. Proc. Code § 437c(o)(2).  
26 Plaintiff cannot meet this burden and so L.A. Cellular is entitled to summary judgment or, in  
27 the alternative, summary adjudication.  
28

IV.

PLAINTIFF'S CAUSES OF ACTION FAIL BECAUSE  
L.A. CELLULAR'S TREATMENT OF DROPPED CALLS IS  
DICTATED BY TARIFF

A. Plaintiff Cannot Claim Ignorance of L.A. Cellular's Provisions Regarding  
Dropped Calls.

1. L.A. Cellular's Customers Routinely Request and Receive Credits  
for Dropped Calls.

*They want that phone  
number because they  
want to be  
advanced.*

In alleging that L.A. Cellular conceals its policy of giving credits for dropped calls, plaintiff runs headlong into the facts. In fact L.A. Cellular's customers routinely request credit for dropped-calls and L.A. Cellular routinely grants such requests. (Fowler Decl. at ¶ 7.) These frequent requests dispel any notion that L.A. Cellular has engaged in the fraudulent practices suggested by plaintiff.

2. L.A. Cellular's Tariff, Governing its Liability for Dropped Calls, is  
Part of its Customers' Contracts.

*is that discredited  
to the fact of a not challenge  
terms of the Chicago file to make  
further more.*

Plaintiff not only ignores the fact that L.A. Cellular routinely gives dropped-call credits, but also the fact that L.A. Cellular has disclosed its dropped-call policy in a tariff on file with the PUC. By her complaint, plaintiff asserts the existence of a scheme by which L.A. Cellular fraudulently conceals from its customers the existence of its dropped-call policy. The fact that L.A. Cellular's tariff discloses its dropped-calls policy disproves plaintiff's claim.

By law, L.A. Cellular's tariff forms a part of its contracts with its customers. "Pertinent rules and regulations which the Public Utilities Commission requires a public utility to adopt and file with the commission automatically become an implied term of any contract made between that public utility and its customer." Sherwood v. County of Los Angeles, 203 Cal. App. 2d 354, 359 (1962). As explained in Gardner v. Basich Brothers Construction Co., 44 Cal. 2d 191 (1955), tariffs on file with the PUC "are deemed a part of" every contract between a public utility and its customers "and the parties are deemed to have

*we do not  
agree with it  
not part  
of the*

*Doesn't  
know  
disclose  
how*

1 contracted with such provisions in mind.” Id. at 194. Under this rule, L.A. Cellular’s tariff  
2 disclosing and limiting its liability for dropped calls is a term of its contract with plaintiff and  
3 bars plaintiff’s claims in this action.

4       **3. The Courts Uniformly Hold That Utility Customers Have Notice of**  
5       **Tariffs Limiting a Utility’s Liability.** *Need case authority*

6       Plaintiff had notice of L.A. Cellular’s dropped-call provisions for the very reason that  
7 they are contained in L.A. Cellular’s tariff. Since public utilities are subject to a complex  
8 regulatory scheme, and since the PUC has held that it will continue to enforce the existing  
9 non-rate tariff provisions of cellular service providers, L.A. Cellular’s customers are deemed  
10 to have notice of tariffs on file with the PUC.

11       The California Supreme Court has held that a lack of actual knowledge of a tariff is  
12 without legal consequence. In Hischemoeller v. National Ice & Cold Storage, 46 Cal. 2d 318  
13 (1956), a plaintiff brought suit in superior court against a public warehouseman for damages  
14 allegedly resulting from negligence in the storage of dried chili peppers. Id. at 320. Because  
15 the defendant was a public utility, the California Supreme Court held that the trial judge erred  
16 in instructing the jury that “actual knowledge and understanding on plaintiff’s part of the  
17 clauses limiting liability were essential to any such limitations.” Id. at 324-35. The Supreme  
18 Court explained that actual knowledge was not necessary because the tariff provisions were  
19 part of the plaintiff’s contract:

20       Defendant claims the schedules with their rates and regulations and limitations  
21 of liability issued by the Public Utilities Commission automatically became  
22 implied terms of any contract made between a public utility and its customer.  
Also that absence of actual knowledge of these terms on the part of the  
customer is legally inconsequential. This contention is correct.

23 Id. at 325. Under the rule of Hischemoeller, the question of whether plaintiff understood or  
24 reviewed L.A. Cellular’s tariffs is immaterial and the tariffs are enforceable pursuant to their  
25 terms. See also Colich & Sons v. Pacific Bell, 198 Cal. App. 3d 1225, 1234 (1988) (“[T]he  
26 tariff limitation on liability has been held to apply to third parties as well as to the utility’s  
27 customers.”)

1           4.     **L.A. Cellular Has No Duty to Provide Additional Notice of its**  
2                   **Dropped-Call Tariff.**

3           In alleging that L.A. Cellular "conceals the fact that it will issue airtime credit for its  
4 customers' dropped calls upon request," plaintiff suggests that L.A. Cellular has a duty to  
5 supplement its tariff filings by providing additional notice of its dropped-call tariff.  
6 (Complaint at ¶ 13.) Yet the very rationale underlying the use of tariffs contradicts plaintiff's  
7 suggestion.

8           A right to notice beyond that provided by tariff would undermine the bright-line rule  
9 articulated in decisions such as Hischmoeller. Decisions limiting a plaintiff's recovery to  
10 that set forth in the tariff regardless of the plaintiff's state of knowledge would have little  
11 meaning if a plaintiff could obtain recovery in excess of the tariff simply by alleging lack of  
12 notice. As stated in Cole v. Pacific Tel. & Tel. Co., 112 Cal. App. 2d 416, 419 (1952), tariff  
13 limitations of liability are an integral part of the regulatory scheme: "The theory underlying  
14 these decisions is that a public utility, being strictly regulated in all operations with  
15 considerable curtailment of its rights and privileges, shall likewise be regulated and limited as  
16 to its liabilities." See also Trammell v. Western Union Tel. Co., 57 Cal. App. 3d 538, 551  
17 (1976) ("If uniformity is to prevail, the tariff schedule must represent the whole duty and the  
18 whole liability of the company rendering the service."). Plaintiff cannot premise a cause of  
19 action on a lack of notice of L.A. Cellular's tariff without upsetting the certainty and  
20 uniformity that the Legislature has attempted to ensure for public utilities by requiring the  
21 filing of tariffs.

22     **B. Plaintiff Cannot Challenge the Terms of L.A. Cellular's Tariff in This**  
23           **Court.**

24           Finally, should plaintiff's complaint be read as an attack on the terms of L.A.  
25 Cellular's tariff, plaintiff cannot make that attack here. As noted above, the PUC has  
26 announced its decision to continue enforcing the terms of existing non-rate tariffs of cellular  
27 service providers. As a consequence, Public Utilities Code Section 1759 will divest this  
28 Court of jurisdiction to review or reverse L.A. Cellular's dropped-calls tariff. The California

1 Supreme Court addressed an identical issue in Waters v. Pacific Telephone Company, 12 Cal.  
2 3d 1, (1974), where a plaintiff sought damages for inadequate telephone service that  
3 purportedly included "lack of proper maintenance service, incompleting calls, unauthorized  
4 removal of phones, improper installation of phones, and a variety of other frustrating  
5 experiences specified in her complaint." Id. at 5. Because the telephone utility had filed  
6 tariffs limiting its liability for interruptions in service, the California Supreme Court affirmed  
7 the entry of judgment for defendant. Id. at 4; see also Cole, 112 Cal. App. 2d at 420;  
8 Trammell, 57 Cal. App. 3d at 554. In reaching its decision, the Court relied on Public  
9 Utilities Code Section 1759, which divests a superior court of "jurisdiction to review, reverse,  
10 correct, or annul any order or decision of the commission." Cal. Pub. Util. Code § 1759.  
11 Here, the PUC has announced its decision to continue enforcing non-rate tariffs. This Court  
12 thus lacks jurisdiction to hear a challenge to the terms of L.A. Cellular's dropped-call tariff.<sup>2</sup>

13 C. Without Legislative or Administrative Guidance, This Court Cannot  
14 Determine the Appropriate Level for Cellular-Service-Provider Customer  
15 Service.

16 Plaintiff's claim of fraudulent practices also extends to a vague allegation that  
17 L.A. Cellular's customer service is so inadequate as to constitute an unfair or fraudulent  
18 business practice. Undeterred by the fact that L.A. Cellular's customers routinely request and  
19 receive credit for dropped-calls, plaintiff nonetheless alleges a fraudulent scheme in which  
20 customers calling L.A. Cellular "must pass through a series of electronic menus," wait an  
21 excessive time for a live operator, and engage in an allegedly "time-consuming and  
22 burdensome reporting procedure." (Complaint at ¶¶ 16, 17.) Because plaintiff seeks to  
23 enjoin these practices, she necessarily asks this Court to oversee L.A. Cellular's customer  
24 service operations including the number of customer service representatives it must employ  
25 and the content of the electronic menus in its computerized telephone answering system. This  
26

27 <sup>2</sup> As discussed previously, plaintiff's action is subject to federal preemption to the extent  
28 that it affects rates.

1 Court ought not to engage in the type of micro-management requested by plaintiff and should  
2 leave such matters to resolution by the competitive forces of the marketplace or the  
3 appropriate administrative agency.

4 Courts have long recognized that private actions are not appropriate where an initial  
5 determination of the applicable standard is better left to another governmental entity. For  
6 example, in California Grocers Ass'n v. Bank of America, 22 Cal. App. 4th 205 (1994), the  
7 Court of Appeal held that the trial court had abused its discretion by issuing an injunction  
8 under Section 17200 prohibiting banks from charging a \$3 service fee for certain check  
9 deposits. The appellate court held that the question of whether the fee was too high was best  
10 left to the Legislature or to administrative regulation: "Judicial review of one service fee  
11 charged by one bank is an entirely inappropriate method of overseeing bank service fees." Id.  
12 at 218. The court recognized that it was ill-equipped to make the initial determination of  
13 what fee was proper: "Legislative committees and an administrative officer charged with  
14 regulating an industry have better sources of gathering information and assessing its value  
15 than do courts in isolated cases." Id. (quoting Lazzareschi Inv. Co. v. San Francisco Fed.  
16 Sav. & Loan Assoc., 22 Cal. App. 3d 303, 311 (1971)). The court therefore dissolved the  
17 injunction.

18 Similarly, in Wolfe v. State Farm Fire & Cas. Ins. Co., 46 Cal. App. 4th 554 (1996),  
19 the court refused to entertain a Section 17200 action based on insurers' refusal to issue new  
20 homeowners' policies in the wake of the Northridge earthquake. In that case, as in this one,  
21 the defendants "ha[d] violated no laws." 46 Cal. App. 4th at 564. Moreover, "a judicial  
22 resolution of [the] complaint would involve the courts in microeconomic managing." Id.  
23 at 567. Rather than undertake such a perilous task, the court found it dispositive that: (1) the  
24 insurance industry was heavily regulated, (2) the Legislature had ordered the insurance  
25 commissioner to investigate the problem, and (3) no specific statute addressed the defendants'  
26 actions. Id. at 563-566.

27  
28  
*Are we interested in "micro-managing"  
or just getting things done? Just  
try to make sure that the  
tariff are placed in fair  
manner.*

1 The courts of this State have thus regularly and wisely refused to trump reasoned  
2 legislative and administrative decisionmaking through the instrument of Section 17200.<sup>3</sup>  
3 Under the consistent holding of these decisions, the question of what customer service is  
4 adequate, as the question of what fee was too high in California Grocers, is a question for the  
5 marketplace, an administrative agency, or the Legislature. These bodies are better able to  
6 make such a determination. As the California Grocers court recognized, administrative  
7 agencies and legislative committees "have better sources of gathering information and  
8 assessing its value" than do the courts. These bodies are also in a superior position to create a  
9 uniform rule for all cellular telephone companies and consider the impact of such a standard  
10 on other regulatory provisions.<sup>4</sup>

11 Absent action by an administrative agency or the Legislature, this Court should permit  
12 market forces to determine the level of customer service that L.A. Cellular is to provide. The  
13 relief that plaintiff seeks would enmesh this Court in the daily business operations of L.A.  
14 Cellular and would require this Court to second guess such decisions as whether L.A. Cellular  
15 should be required to hire more than the approximately 250 customer service representatives  
16 it currently employs. (Fowler Decl. at ¶ 5.) Moreover, the relief that plaintiff seeks in this  
17  
18

---

19 <sup>3</sup> See also Samura v. Kaiser Found. Health Plan, Inc., 17 Cal. App. 4th 1284, 1301-02  
20 (1993) (refusing to interfere with health care contracts pursuant to Section 17200 because  
21 "the courts cannot assume general regulatory powers over health maintenance  
22 organizations through the guise of enforcing Business and Professions Code section  
23 17200"); cf. Harris v. Capital Growth Investors XIV, 52 Cal. 3d 1142, 1168 (1991)  
24 (refusing, in an action brought under the Unruh Act, to prohibit landlords from using  
income formulas because "[i]n the absence of clear legislative direction, . . . we are  
unwilling to engage in complex economic regulation under the guise of judicial  
decisionmaking").

25 <sup>4</sup> The PUC is currently examining the contours of its jurisdiction over "other terms and  
26 conditions" of cellular service. It is contemplating the development of uniform rules that  
27 will address "consumer complaints, billing disputes, and related [cellular-service-provider]  
28 matters." Re Mobile Telephone Service and Wireless Communications, 174 P.U.R. 4th  
543, 553 (Cal. PUC, Dec. 20, 1996).



1 forum would be wholly inappropriate, as it would lead to the oversight of the customer  
2 service of only one company -- L.A. Cellular -- and not that of its competitors.

3 V.

4 **CONCLUSION**

5 This Court should grant L.A. Cellular's motion for summary judgment or summary  
6 adjudication as L.A. Cellular has fully disclosed its treatment of dropped calls in a tariff filed  
7 with the PUC. Because the PUC has announced that it will continue to enforce the existing  
8 non-rate tariffs of cellular service providers, L.A. Cellular's dropped-call tariff has the force  
9 and effect of law and is deemed a part of L.A. Cellular's customer contracts.

10  
11 DATED: June 25, 1997

12 GIBSON, DUNN & CRUTCHER LLP  
13 JAMES R. MARTIN  
14 DANIEL S. FLOYD  
15 ROBERT H. WRIGHT  
16 SEAN P. GATES

17 By: 

18 Daniel S. Floyd

19 Attorneys for Defendant Los Angeles Cellular  
20 Telephone Company

21 LL970790.173/49

**EXHIBIT 7**

1 GIBSON, DUNN & CRUTCHER LLP  
2 JAMES R. MARTIN, SBN 045602  
3 DANIEL S. FLOYD, SBN 123819  
4 ROBERT H. WRIGHT, SBN 155489  
5 SEAN P. GATES, SBN 186247  
6 333 South Grand Avenue  
7 Los Angeles, California 90071-3197

8 (213) 229-7000

9 Attorneys for Defendant Los Angeles Cellular  
10 Telephone Company.

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF LOS ANGELES

13 ERIKA LANDIN, on behalf of herself and  
14 all others similarly situated,

15 Plaintiff,

16 v.

17 LOS ANGELES CELLULAR TELEPHONE  
18 COMPANY,

19 Defendant.

CASE NO. BC 143305

Assigned to the Honorable Ernest M. Hiroshige

**DECLARATION OF STEPHEN FOWLER  
IN SUPPORT OF THE MOTION OF LOS  
ANGELES CELLULAR TELEPHONE  
COMPANY FOR SUMMARY JUDGMENT  
OR, IN THE ALTERNATIVE, SUMMARY  
ADJUDICATION**

[Notice of Motion and Motion, Separate  
Statement of Undisputed Facts, Declaration of  
Robert Wright, and Statement of Non-California  
and Regulatory Authority filed herewith]

Date: July 30, 1997

Time: 9:00 a.m.

Dept: 54

Trial Date: None Set

CLASS ACTION

23 I, Stephen Fowler, declare as follows:

24 1. I am the Vice President, Customer Care, of Los Angeles Cellular Telephone  
25 Company ("L.A. Cellular"). This declaration is submitted in support of L.A. Cellular's  
26 Motion for Summary Judgment or, in the Alternative, Summary Adjudication. I have  
27 personal knowledge of the facts set forth below and, if called upon to do so, I could and  
28 would competently testify thereto under oath.

1           2.     The phrase "dropped call" refers to a cellular telephone call that is involuntarily  
2 interrupted due to causes beyond the control of a cellular telephone subscriber. Dropped calls  
3 may occur for a number of reasons including system congestion, unusual atmospheric  
4 conditions, and difficulty in providing cellular telephone service within certain hard to reach  
5 areas such as tunnels. Dropped calls are an expected and natural result of the use of radio-  
6 based technology in telecommunications. The phrase "dropped call" does not include those  
7 calls interrupted by causes within the control of a cellular subscriber, such as a subscriber  
8 accidentally unplugging a phone or allowing a battery to run down.

9           3.     As the Vice President, Customer Care, of L.A. Cellular, I am responsible for  
10 ensuring that L.A. Cellular provides a credit to any of its customers who request credit for a  
11 dropped call. L.A. Cellular provides such a credit upon the request of a customer when a  
12 customer redials a call within five minutes after that call is dropped and the customer has not  
13 placed any intermediate calls prior to returning the dropped call. The amount of the credit is  
14 the air time cost to the customer of the first minute of the redialed call.

15           4.     Because L.A. Cellular's customer service representatives do not have access to a  
16 customer's calling records for any given month until after the end of the billing cycle for that  
17 month, L.A. Cellular requires that a customer who is requesting credit for dropped calls do so  
18 after the end of that customer's billing cycle. The customer then has ninety days to request  
19 credit for dropped calls measured from the end of the billing cycle in which the interruption  
20 occurred.

21           5.     L.A. Cellular's customer service is available by telephone twenty-four hours a  
22 day, seven days a week. L.A. Cellular staffs its customer care department in anticipation of  
23 expected call volumes and at the present time employs approximately two hundred and fifty  
24 customer service representatives. L.A. Cellular's customer service representatives address the  
25 questions and concerns of L.A. Cellular's customers and, when appropriate, provide *no per. L.A.*  
26 customers with credits including credits for dropped-calls.

27           6.     L.A. Cellular trains each of its customer service representatives regarding the *no*  
28 proper handling of dropped-call credits and requires all of its representatives to familiarize *per L.A.*

1 themselves with L.A. Cellular's policy for handling credits for dropped-calls. Thus L.A.  
2 Cellular's Core Service Skills training manual instructs representatives regarding "When a  
3 Customer Calls for Dropped Call (Billed Air) Credit." Among other things, the representative  
4 is asked to "Please Remember" that "One air time minute credit will be issued for each redial  
5 made after a call has been 'dropped,' 'cut-off' or disconnected mid-conversation." Attached  
6 hereto as Exhibit A is a true and correct copy of section 11, page 36 of L.A. Cellular's Core  
7 Service Skills training manual containing instructions on the handling of dropped calls.

8 7. L.A. Cellular's customer service representatives routinely receive requests for <sup>no</sup>  
9 dropped-call credits and routinely extend such credits pursuant to L.A. Cellular's policy. <sub>per</sub>

10 8. I am not aware of any act or attempt by L.A. Cellular to misrepresent the terms <sup>no</sup>  
11 of its policy for providing dropped-call credits nor any written materials from L.A. Cellular <sub>per</sub>  
12 misrepresenting the terms of that policy. To the contrary, L.A. Cellular has trained its  
13 customer service representatives to inform customers of L.A. Cellular's policy for handling  
14 dropped-call credits whenever a customer requests such information. I am also aware that  
15 L.A. Cellular's cellular-service contracts refer generally to the existence of L.A. Cellular's  
16 tariffs on file with the Public Utilities Commission.

17 I declare under penalty of perjury under the laws of the State of California that the  
18 foregoing is true and correct and that this Declaration was executed on May 9, 1997, at  
19 Cerritos, California.

20   
21 Stephen Fowler

22 LT971210.1247

10/10/10

10/10/10

### **When a Customer Calls for Dropped Call (Billed Air) Credit**

1. Write down account or mobile number on log sheet.
2. Verify all info on the 0301 or 0101 screen.
3. Go to the 0308 screen.
4. Go to the summary of call charges. Check to see if the customer exceeded the minutes included in their Value Plan Agreement. If so, go to the detail of calls.
5. Credit the account 1 minute for any number dialed again in succession within 5 minutes.
6. Get the credit sheet and add credit to sheet with Billed Air code (4500).
7. Go to comments, note how much credit was processed, which code was used, what mobile number was credited and for which month.

***Please Remember:***

1. One air time minute credit will be issued for each redial made after a call has been "dropped," "cut-off" or disconnected mid-conversation.  
Note: Calls must be redialed within 5 minutes.
2. Redials are not credited, the dropped call is credited.
3. Incoming wrong number - Maximum of 1 minute credit.
4. Outgoing wrong number - 1 minute maximum air time, 1 minute toll.
5. Service and radio station calls are charged at the regular service rates.

**EXHIBIT 8**



1 GIBSON, DUNN & CRUTCHER LLP  
2 STEVEN E. SLETTEN, SBN 107571  
3 RICHARD D. GLUCK, SBN 151675  
4 CHRISTINE NAYLOR, SBN 172277  
5 333 South Grand Avenue  
6 Los Angeles, California 90071-3197

7 (213) 229-7000

8 Attorneys for Defendant Los Angeles Cellular  
9 Telephone Company

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF LOS ANGELES

12 ERIKA LANDIN, on behalf of herself and  
13 all others similarly situated,

14 Plaintiff,

15 v.

16 LOS ANGELES CELLULAR TELEPHONE  
17 COMPANY,

18 Defendant.

CASE NO. BC 143305

Assigned to the Honorable Ernest M. Hiroshige

PROOF OF SERVICE OF:

NOTICE OF MOTION AND MOTION OF  
DEFENDANT LOS ANGELES CELLULAR  
TELEPHONE COMPANY TO CONTINUE  
TRIAL DATE AND ALL ASSOCIATED  
PRETRIAL DATES; MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT  
THEREOF; DECLARATIONS OF STEVEN E.  
SLETTEN AND GREGORY P. FARRELL IN  
SUPPORT THEREOF; [PROPOSED] ORDER

Date: February 16, 1999

Time: 9:00 a.m.

Dept: 54

Trial Date: March 17, 1999

25 LT990280.048/1+

1 GIBSON, DUNN & CRUTCHER LLP  
2 STEVEN E. SLETTEN, SBN 107571  
3 RICHARD D. GLUCK, SBN 151675  
4 CHRISTINE NAYLOR, SBN 172277  
5 333 South Grand Avenue  
6 Los Angeles, California 90071-3197  
7 (213) 229-7000

8 Attorneys for Defendant Los Angeles Cellular  
9 Telephone Company

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF LOS ANGELES

12 ERIKA LANDIN, on behalf of herself and  
13 all others similarly situated,

14 Plaintiff,

15 v.

16 LOS ANGELES CELLULAR TELEPHONE  
17 COMPANY.

18 Defendant.

CASE NO. BC 143305

Assigned to the Honorable Ernest M. Hiroshige

DECLARATION OF STEVEN E. SLETTEN  
IN SUPPORT OF DEFENDANT LOS  
ANGELES CELLULAR TELEPHONE  
COMPANY'S MOTION TO CONTINUE  
TRIAL DATE AND ALL ASSOCIATED  
PRETRIAL DATES

Date: February 16, 1999

Time: 9:00 a.m.

Dept: 54

Trial Date: March 17, 1999

FILED UNDER SEAL

21 I, Steven E. Sletten, hereby declare as follows:

22  
23 1. I am an attorney at law duly licensed to practice before all courts of the State of  
24 California, and am a partner with the law firm of Gibson, Dunn & Crutcher LLP. I am one of  
25 the lawyers principally responsible for representing defendant Los Angeles Cellular  
26 Telephone Company ("L.A. Cellular") in this action. The matters stated in this declaration are  
27  
28

1 true of my own personal knowledge and, if called as a witness, I could and would  
2 competently testify to them.

3 2. Plaintiff filed this action on January 26, 1996 as a putative class action. Her  
4 complaint alleged the existence of a class of individuals comprised of all L.A. Cellular  
5 subscribers who experienced dropped calls for which they received partial or no credit.  
6 Plaintiff's complaint seeks to enjoin L.A. Cellular from "acts of unfair competition," as  
7 described in the complaint, and also purports to seek disgorgement and/or restitution on  
8 behalf of the class.

9 3. L.A. Cellular's Motion for Summary Judgment was heard on November 12.  
10 1997 and the Court issued its Decision on December 19, 1997. Distinguishing the decision in  
11 *Waters v. Pacific Telephone Co.*, 12 Cal. 3d 1 (1974), in which the plaintiff sued defendant  
12 for monetary damages because of defendant's alleged failure to provide adequate phone  
13 service, the Court denied L.A. Cellular's motion for summary judgment because "plaintiff is  
14 not seeking damages . . . [but] is challenging whether or not the lack of advertising constitutes  
15 an unfair business practice under Bus. & Prof. Code §17200." A true copy of the Court's  
16 December 19, 1997 Ruling on Submitted Matter (denying L.A. Cellular's motion for summary  
17 judgment) is attached to this declaration as Exhibit A.

18 4. Plaintiff's motion for class certification was heard by the Court on July 31,  
19 1998. On September 30, 1998, the Court denied plaintiff's motion for class certification. A  
20 true copy of the Court's September 30, 1998 Ruling on Submitted Matter (denying plaintiff's  
21 motion for class certification) is attached to this declaration as Exhibit B. The Court  
22 reiterated in its ruling that "plaintiff does not seek damages, but rather challenges the failure  
23 to advertise the drop call credit policy." Exhibit B at pp. 2-3. Citing the Court of Appeals'  
24 decision in *Day v. AT&T Corp.*, 63 Cal. App. 4th, 325 (1998), this Court held that "to seek  
25 injunctive relief in this type of action was appropriate; to seek a monetary recovery, whether  
26 or not in the form of disgorgement, was not." Exhibit B at p. 3.

1           5.       This Court conducted a Trial Setting Conference on November 13, 1998. At  
2 that Conference, this matter was set on the Court's trial calendar for March 17, 1999.

3           6.       During the week of January 11, 1999, I spoke with Mary Jane Fait, one of the  
4 lawyers representing the plaintiff in this action. I informed Ms. Fait that recent changes in  
5 L.A. Cellular's structure has resulted in AT&T Wireless Services, Inc. assuming management  
6 and supervisory responsibility for L.A. Cellular's operations. I also told her that the change in  
7 L.A. Cellular's management structure would result in several changes in L.A. Cellular's  
8 policies and operations, many of which would take place over the next several months. One  
9 of the upcoming changes is a change in the way in which L.A. Cellular handles credits for  
10 dropped calls. I further informed Ms. Fait that we believe that the change, when  
11 implemented, will moot plaintiff's remaining claims in this action.

12          7.       In light of these developments, I requested that plaintiff stipulate to continue the  
13 trial date and all pretrial dates in this action to allow the parties time to determine how the  
14 upcoming change in L.A. Cellular's dropped-call credit policy would affect this action. I told  
15 Ms. Fait that because the change will render moot plaintiff's remaining claims in this action,  
16 we believe it makes no sense to incur the substantial expense of preparing this case for trial.  
17 Ms. Fait told me that she would have to check with her co-counsel, and would get back to me  
18 shortly. She also requested that I put in writing our suggestion and the reasons for it.

19          8.       On January 15, 1999, Ms. Fait called to tell me that she had discussed the matter  
20 with her co-counsel and that they were unwilling to stipulate to continue the trial date. She  
21 did agree, however, that it would be advantageous to all parties for the Court to consider  
22 sooner rather than later what impact the change in L.A. Cellular's dropped-call policy will  
23 have on this case.

24          9.       On January 19, 1999, I sent Ms. Fait a letter describing the upcoming changes at  
25 L.A. Cellular and reiterating my request that plaintiff stipulate to continue the trial date in this  
26 matter. I also informed Ms. Fait in my letter that L.A. Cellular would be scheduling an *ex*  
27 *parte* hearing to request an order allowing a motion to continue the trial date to be heard on  
28

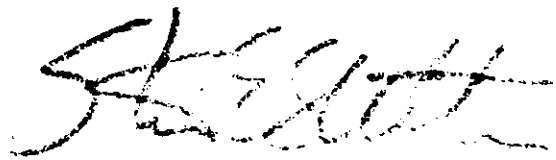
1 shortened time. A true copy of my letter to Ms. Fait is attached to this declaration as  
2 Exhibit C.

3 10. I called Ms. Fait on January 25, 1999 to inform her that L.A. Cellular would  
4 appear *ex parte* in Department 54 at 8:30 a.m. on January 27, 1999, to request an order  
5 shortening time to bring and have heard a motion to vacate the trial date and all associated  
6 pretrial dates. In subsequent conversations with Ms. Fait, she advised that her partner  
7 Michael Hyman, would participate telephonically at the *ex parte* hearing and that her co-  
8 counsel Lionel Glancy (or someone from his office) would appear in person. Today,  
9 January 26, 1999, I spoke with Peter Binkow, counsel for plaintiff and confirmed that the *ex*  
10 *parte* application would be heard on Thursday January 28 and not Wednesday January 27, and  
11 I confirmed this in a letter to Mr. Binkow with a copy to Mr. Hyman. A copy of my letter is  
12 attached to this Declaration as Exhibit D.

13 11. The upcoming change in L.A. Cellular's dropped-call credit policy constitutes a  
14 "significant change" in the status of the case. It is not a development that could reasonably  
15 have been anticipated at the time of the Trial Setting Conference in November. The decision  
16 to make the change was communicated to me only recently, and I am informed the change  
17 will be implemented in the next several months. As soon I we became aware of the planned  
18 change, I contacted counsel for plaintiff to discuss how the change in policy will impact  
19 plaintiff's claims in this case.

20 12. This case only recently has been placed on the Court's trial calendar, and no  
21 previous continuances have been requested by any of the parties or granted by the Court.

22 I declare under penalty of perjury under the laws of the State of California that the  
23 foregoing is true and correct. Executed this 26th day of January, 1999 at Los Angeles,  
24 California.

25 

26  
27 Steven E. Sletten

28 OA990240.002/4+

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I am employed in the County of Los Angeles, State of California; I am over the age of eighteen (18) years and am not a party to this action; my business address is 640 So. Olive Street, Los Angeles, California 90014 in said County and State; I am employed as a messenger by ENI; on the 29th day of **January, 1999**, I served the attached:

**NOTICE OF MOTION AND MOTION OF DEFENDANT LOS ANGELES  
CELLULAR TELEPHONE COMPANY TO CONTINUE TRIAL DATE  
AND ALL ASSOCIATED PRETRIAL DATES; MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT THEREOF;  
DECLARATIONS OF STEVEN E. SLETTEN AND GREGORY P.  
FARRELL IN SUPPORT THEREOF**

DECLARATION OF STEVEN E. SLETTEN IN SUPPORT OF  
DEFENDANT LOS ANGELES CELLULAR TELEPHONE COMPANY'S  
MOTION TO CONTINUE TRIAL DATE AND ALL ASSOCIATED  
PRETRIAL DATES

DECLARATION OF GREGORY P. FARRELL IN SUPPORT OF  
DEFENDANT LOS ANGELES CELLULAR TELEPHONE COMPANY'S  
MOTION TO CONTINUE TRIAL DATE AND ALL ASSOCIATED  
PRETRIAL DATES

**[PROPOSED] ORDER GRANTING DEFENDANT LOS ANGELES  
CELLULAR TELEPHONE COMPANY'S MOTION TO CONTINUE  
TRIAL DATE AND ALL ASSOCIATED PRETRIAL DATES**

## PROOF OF SERVICE

by placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown:

**Lionel Z. Glancy, Esq.  
Peter A. Binkow, Esq.  
Law Offices of Lionel Z. Glancy  
1801 Avenue of the Stars, Ste 308  
Los Angeles, CA 90067  
Attorneys for Erika Landin**